United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

TO BE SUBMITTED

76-133

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA :

-against- :

ALAN GOTTFRIED, :

Defendant-Appellant :

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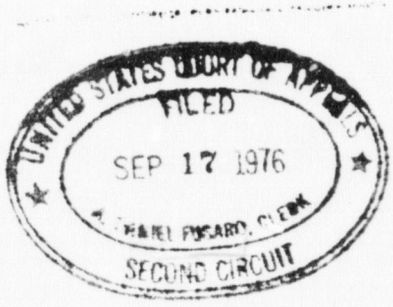
76-1338

BRIEF FOR THE APPELLANT



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-against- : Docket No. 76-1338

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On Appeal From the United States District Court
For The Southern District Of New York

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

This is an appeal from a conviction in the United States District Court for the Southern District of New York, Lawrence Pierce J., after a plea of guilty to a charge under 21 U.S.C. 646 - conspiracy to violate the narcotics law. The defendant was sentenced to two years probation.

Before plea, the defendant moved to dismiss the indictment based on the unconstitutionality of the Comprehensive Drug Abuse Prevention and Control Act of 1970. That motion was denied but the issue was preserved through consent of the United States Attorney and the Court that the issue survive the plea. The appellant hereby appeals from the denial of that motion.

FACTS

In April, 1975, the appellant ALAN GOTTFRIED agreed with a person who was, unknown to him, an informer working with the Drug Enforcement Administration. As a result of conversations had with that informant, he later met with an undercover agent and agreed to assist in furnishing cocaine to the undercover agent.

On two occasions, the defendant did so assist and subsequent to those two occasions, left the conspiracy and had no further activity in narcotics traffic. He was indicted in three counts of a five-count indictment and entered a plea of guilty to the first count under the conspiracy statute.

All transactions alleged in the indictment involved cocaine, a Schedule II narcotic drug.

POINT I

THE STATUTE UNCONSTITUTIONALLY DELEGATES TO THE EXECUTIVE BRANCH THE POWER TO SET THE PENALTY FOR TRANSGRESSIONS OF THE LAW.

Congress has divided the area of controlled substances into five areas, denoted as Schedules I-V in the Comprehensive Drug Abuse Prevention and Control Act of 1970, through certain criteria announced in 21 U.S.C. 812. As an initial step, in 1970 Congress placed the substances it wished controlled in the schedule it deemed proper. That placement was based on information then available. Each schedule and/or type of drug carries with it a penalty for illicit manufacture, distribution or dispensation or possession with intent to manufacture, distribute, or dispense the forbidden material (21 U.S.C. 841). Penalties range (in terms of time sentenced) from one year (for conviction for a Schedule V drug), to not more than fifteen years (first conviction for a Schedule I or II narcotic drug).

In 21 U.S.C. 811, Congress empowers the Attorney General to reclassify any of the narcotic substances contained in the Schedules initially promulgated by the Congress, or to add or delete substances from the controlled list. Congress, therefore, has no further responsibility for amending the Schedules as new information becomes available. Because of the fact that by

changing the schedule, the Attorney General affects the penalty which may be imposed, the Appellant here contends that this is an impermissible delegation of the legislative powers.

Of course, Congress ordinarily may delegate powers under broad standards. No other general rule would be feasible or desirable. United States v. Robel, 389 U.S. 258, 274 (1967). But that delegation is normally limited to either the rule-making and administrative functions not affecting the purposes of an Act. See, e.g., St. Louis I.M.& S. v. Taylor, 210 U.S. 281 (1908) (rate making); Union Bridge Co. v. United States, 204 U.S. 364 (1907) (navigation); United States v. Chemical Foundation, 272 U.S. 1 (1926) (trading with the enemy); Zemel v. Rusk, 381 U.S. 1 (1965) (passport validation); Federal Radio Commission v. Nelson Brokers Co., 289 U.S. 266 (1933) (licensing).

However, any delegation of authority must be viewed within the rigid scriptures of the Constitutional mandate that "all legislative powers herein granted shall be vested in a Congress of the United States..." United States Constitution, Article I, Section I. The only power which can be conferred by a statute, is the power to make regulations to carry out the purposes of the act, not to amend it. Miller v. United States, 294 U.S. 435 (1935). An absolute grant of

discretion to a public officer to deny or grant a privilege or right is unconstitutional. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In permitting the Attorney General to set the penalty or in the alternative to mandate the status quo because of a constitutional abdication of power makes the Attorney General a law-maker and not a rule-maker.

It is axiomatic that the authority to define and fix the punishment for crime is legislative. Ex Parte United States, 242 U.S. 27, 42 (1916); United States v. Jones, 438 F.2d 461 (7th Cir. 1971). An examination of 21 U.S.C. 811 forces the analyst to a conclusion in regard to the Act that Congress has ceded that responsibility to the Attorney General.

Despite the fact that the principle enunciated in Schecter Poultry Corp. v. United States, 295 U.S. 495 (1934) and in Panama Refining Co. v. Ryan, 293 U.S. 388 (1934) has been notable for the failure of the courts to ever again find sufficient delegation to follow them, and the general disrepute that they find in current juridical philosophy, 1/ the statutory scheme of the Comprehensive Drug Abuse Prevention and Control Act of 1970 gives such broad penal power to the Attorney General as to make it a total abdication by the Congress of the mandated exercise of its power.

1/ See, National Cable Television Ass'n Inc. v. United States, 415 U.S. 352 (1974) (Marshall, J. Concurring); Sunshine Anthracite Coal Co. v. Atkins, 319 U.S. 381, 398 (1940).

Were the penalties fixed by Congress, the Attorney General merely having a rule-making authority to add and subtract substances to or from the list, or were the list itself a final continuing pronouncement of the Congress, attack on the constitutionality of the statute would be unavailing.[2/] But in granting the responsibility and power to the Attorney General to classify or declassify and reclassify controlled substances, Congress gave him the power to set the penalty for a transgression relative to any particular drug. Research in the area of the delegation of legislative power has discovered no case to counsel where the rule-making authority vested by the Congress in an executive agency allows a variable penalty for the violation of the underlying policy of the Act which those rules were meant to implement.[3/]

Admittedly, one need not go into the legislative history to define the purposes of the cession of power to the executive. With the proliferation of little-understood drugs capable of abuse, Congress did not wish to be burdened with the

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[2/] Attacks on the arbitrary classification of controlled substances have been routinely unsuccessful. See, United States v. DeLauria, 394 F.Supp 770 (D.C.Mass. 1970); United States v. Kiffer, 477 F.2d 349 (2d Cir. 1973).

[3/] United States v. Westlake, 480 F.2d 1205 (5th Cir. 1973) holds against this argument but in terms so spare as to suggest that all considerations argued herein were either not presented or not considered. It is respectfully suggested that Westlake's paucity of analysis and discussion rob it of persuasive vitality.

job of reclassifying, which, in fact, would probably be legislatively insurmountable. That, however, is not an excuse for choosing a mechanism which is constitutionally impermissible.

If the statutory scheme is unconstitutional as to its general provisions regarding cocaine and other substances covered by international agreement, the statute itself is even more repugnant since there is absolutely no standard set which controls the power to change the schedule or in fact to maintain the schedule on which a drug is to be placed at an executive whim. 21 U.S.C. 811(d).

This statute must be read closely and contrued narrowly. Kent v. Dulles, 357 U.S. 116, 129 (1958). Just as the right to travel is entitled to protection under the due process clause, so is the right to rationally constructed and evenly applied penalties for violation of the law. Where, as here, the statute makes no provision for rationality, where Congress cedes the classification right to another, and where Congress concedes that from the very structure of the statute in which the original classification is made that all such classifications are expected to be changed as new information is made available, the statute must be struck down.

CONCLUSION

THE CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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